IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 16-0439

SOUTHERN MONTANA TELEPHONE CO.,
Appellant and Petitioner,

v.

MONTANA PUBLIC SERVICE COMMISSION, DEPARTMENT OF PUBLIC SERVICE REGULATION, an agency of the State of Montana,
Appellee and Respondent.

LINCOLN TELEPHONE CO.,
Appellant and Petitioner,

v.

MONTANA PUBLIC SERVICE COMMISSION, DEPARTMENT OF PUBLIC SERVICE REGULATION, an agency of the State of Montana,
Appellee and Respondent.

APPELLEE'S RESPONSE BRIEF

On Appeal from the First Judicial District Court,
Lewis and Clark County, the Honorable Mike Menahan and Kathy Seeley, Presiding

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellee restates the issues presented for review, as follows:

1. Whether the district courts erred in affirming the Public Service Commission's determination that the telephone companies failed to establish that any privacy interests its top executives may have in their compensation clearly exceeds the merits of public disclosure of that information?

2. Whether the district courts erred in concluding that the Public Service Commission's method of assessing public disclosure of the compensation paid to the telephone companies' top executives was not a "rule" within the meaning of the Montana Administrative Code's rule making protocol?

3. Whether the district courts erred in affirming the Public Service Commission's determination that the telephone companies failed to establish that compensation paid to their top executives was a "trade secret"?

4. New issues on appeal from the *Amicus* Brief should not be considered by the Court.

STATEMENT OF THE CASE

Appellee supplements the statement of the case submitted by Appellant as follows:

Eligible Telecommunications Carriers ("ETCs"), such as Southern Montana Telephone Company ("SMTC") and Lincoln Telephone Company ("LTC"), are required to make regular compliance filings with the Montana Public Service Commission ("Commission" or "PSC") in order to gain access to substantial federal subsidies known as Universal Service Funds ("USF"). The Federal Communications Commission ("FCC") and state law establish state utility commissions as the gatekeeper of USF subsidies in each state. Mont. Code Ann. § 69-3-840 (2015). The PSC oversees the reporting and expenditure of approximately $93 million in annual High-Cost and Low Income Assistance subsidies which the federal government disburses to Montana ETCs. One major purpose of these compliance filings is to prevent the waste, fraud, and abuse of these generous federal subsidies.

The Commission must certify SMTC and LTC as an ETC each year in order for each company to receive the High-Cost and Low Income Assistance USF support. The ETCs use these federal subsidies to deploy telecommunications infrastructure to serve rural areas in Montana where, without government support, there would be no business case for it. SMTC receives approximately $3 million per year in federal subsidies which is in excess of 55 percent of its annual revenues. LTC receives approximately

$400,000 per year in federal subsidies amounting to more than 30 percent of its annual revenues.

The Commission found based on substantive evidence and administrative expertise that both telephone companies' Motions for Protective Order to protect employee compensation information on the basis of trade secret must be denied. The Commission determined that the demands of individual privacy do not clearly outweigh the right to public disclosure of the compensation of the telephone companies' executive and management employees. Pursuant to the Commission's decision, compensation information for executive or management employees that receive $100,000 or more in total compensation from SMTC and LTC is not subject to confidentiality.

Both telephone companies filed actions for judicial review in district court in the First Judicial District. One was assigned to District Court Judge Mike Menahan (SMTC) and the other to District Court Judge Kathy Seeley, (LTC). After the matter was submitted on briefs, Judge Menahan affirmed the Commission's determination as to SMTC and denied its petition for judicial review. He reasoned the PSC properly relied on its own expertise and precedent in determining that SMTC failed to establish that it did not

derive independent economic value from keeping its employee compensation private and it was not a trade secret entitled to protection.

Judge Menahan also found that the so-called "rubric" was nothing more than a method of balancing the right to privacy with the right-to-know under Article II, Section 9, of the Montana Constitution, on a case-by-case basis, but in a manner which would result in consistent treatment whenever faced with a request for a protective order regarding employee compensation disclosure. As such, it was not a "rule" within the meaning of the Montana Administrative Procedure Act ("MAPA"), was based on substantial evidence, and was not arbitrary or capricious.

Judge Seeley considered LTC's petition for judicial review and after consideration of the briefs submitted by the parties also denied the Petition and affirmed the PSC's judgment. She found that the "rubric" was really the only way the Commission could perform its duties on a case-by-case basis in a consistent manner. If it had adopted an administrative rule resolving requests for protective orders across the board, it would have violated the case-by-case mandate established by this Court in *Great Falls Tribune v. Mont. Pub. Serv. Comm'n,* 2003 MT 359, 319 Mont. 38, 82 P.3d 876.

She, too, found that the Commission had not acted in an arbitrary manner in its determination that LTC had failed to show how its employee

compensation constituted a trade secret under Mont. Admin. R. 38.2.5007(4)(b)(vi). She underscored the Commission's recognition that LTC failed to make a case for the compensation information to be treated as trade secret based on the speculative concerns discussed in the affidavit of LTC's manager. Regulated utilities, which receive substantial federal funding to build out in unserved and non-competitive markets, do not gain an economic advantage from withholding public access to executive salaries.

As to the PSC's handling of its obligations to disclose information under Article II, Section 9 of the Montana Constitution, Judge Seeley concluded:

> The court finds the process utilized by the PSC in balancing the individual privacy rights of ETC employees against the public right to know was comprehensive and consistent with Montana law. The PSC's reasoning protects the salaries of those not in management or executive positions while paying heed to the need for transparency in the expenditure of federal monies.

Memo and Order, p. 15, ll. 21–25.

STATEMENT OF FACTS

Appellee supplements the statement of facts submitted by Appellant as follows:

In March of 2014, the Commission sent out its annual report compliance letter to all public utilities, who have an annual report filing

obligation pursuant to Mont. Code Ann. § 69-3-203, which included SMTC and LTC. SMTC Admin. Rec. Item # 2, LTC Admin. Rec. Item # 1. The compliance letter cited to Mont. Code Ann. § 69-3-203 which requires that utility annual reports be submitted to the Commission by April 30th of each year. *Id.* The statute provides the Commission the authority to prescribe the form and the information that is to be included on the annual reports. Included in the annual report are schedules requiring employee compensation information for the top ten employees working for the public utility.

Both SMTC and LTC submitted their 2013 annual reports, noting that they would submit the compensation information following the issuance of a protective order by the Commission. SMTC Adm. Rec. Item #1, LTC Admin. Rec. Item # 3. Subsequently both utilities filed motions with the Commission, pursuant to Mont. Code Ann. § 69-3-105(2) and Mont. Admin. R. 38.2.5004. SMTC Adm. Rec. Item #3, LTC Admin. Rec. Item # 2. They each requested confidential protection for the employee compensation information from their 2013 annual reports. *Id.* They both asserted in their motions that the information was either trade secret pursuant to Mont. Code Ann. § 30-14-402(4), or the information must be protected pursuant to the right of individual privacy in the Montana Constitution. Mont. Const. Art.

II, § 10. SMTC attached to its motion the affidavit of manager Larry Mason. SMTC Admin. Rec. Item # 3. LTC attached the affidavit of manager Ken Lumpkin. LTC Admin. Rec. Item # 2.

Both telephone companies are local exchange carriers and provide telecommunications services in Montana. *See* Or. 7385, p. 1 and Or. 7385a, p. 1. Both have been designated an ETC by the Commission for the receipt of Federal USF subsidies. *Id.* Based on that designation, the FCC and the Universal Service Administrative Company require additional compliance filings which are also filed with the Commission. *Id.* Those compliance filings are reviewed throughout the year and considered by the Commission during the annual ETC certification process which concludes by October 1st each year. The 2014 Annual Certification of Montana ETCs was initiated pursuant to 47 C.F.R. 54.313 and 47 C.F.R. 54.422 based on the issuance of a compliance letter to ETCs which required submission of specific reporting information and an affidavit involving the use of federal funds by ETCs.

The FCC comprehensively reformed the federal subsidy program in its USF/ICC Transformation Order. Or. 7385, ¶ 36 and Or. 7385a ¶ 36. A primary motivation of the FCC was to stop the waste, fraud, and abuse it identified in the program, and the agency explained that vigorous oversight of ETCs by the FCC and state commissions was necessary.

> The billions of dollars that the Universal Service Fund disburses each year to support vital communications services come from American consumers and businesses, and recipients must be held accountable for how they spend that money. This requires vigorous ongoing oversight by the Commission, working in partnership with the states, Tribal governments, where appropriate, and U.S. Territories, and the Fund administrator, USAC. This section reforms the framework for that ETC oversight. We establish a uniform national framework for information that ETCs must report to their respective states and this Commission, while affirming that states will continue to play a critical role overseeing ETCs that they designate. We modify and extend our existing federal reporting requirements to all ETCs, whether designated by a state or this Commission, to reflect the new public interest obligations adopted in this Order.

Id. ¶ 36 (citing *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 568 (2011)).

In 2012, the FCC issued an order attempting to reform the ETC program and invited states to help the FCC with its duties to combat waste, fraud, and abuse within the USF programs. *Id.* ¶ 37. The Commission stated in *Order No. 7385* that it supports the FCC's efforts and has joined the USF Strike Force to help the FCC in its duties:

> 'The FCC in its ETC Lifeline Reform Order stated that the order is designed to substantially strengthen the protections against waste, fraud, and abuse...' Abuses in the ETC USF programs are a great concern to the Commission as they are to the FCC. The FCC Chairman has created a Universal Service Fund Strike Force—housed in the agency's Enforcement Bureau—dedicated to combatting waste, fraud, and abuse in the

> USF program. (Press release citation omitted). The FCC has invited states to join as members of the USF Strike Force. The Commission has joined the USF Strike Force to help the FCC in its duties to combat waste, fraud, and abuse within the USF programs.

Id. ¶37 (citing *Lifeline and LinkUp Reform and Modernization*, 27 FCC Rcd 6656, 6659 (2012)).

The Commission held a work session to discuss and act on both companies' motions, considering the question of the disclosure of executive and manager compensation in light of the FCC's reforms. The Commission determined that employee compensation information for SMTC and LTC does not qualify for confidential protection on the basis of trade secret. *Id.* ¶ 24. The Commission entered this finding after applying the six-part test the Montana Supreme Court has established, the core element of which involves whether independent economic value derives from the secrecy of the information for which protection is sought. *Id.*

Both utilities also argued that their employees' right to privacy outweighs the public's right to know. *Id.* ¶ 25. The balance of these rights alters in relation to the import of the information under consideration. Here, the Commission found that while lower-level employees may have a right to privacy as to their compensation that outweighs the public's right to know, other high-level employees at the firm are a different matter, primarily

because they control the receipt and expenditure of federal funds that make up a substantial portion of the company's operating revenues and which the FCC has identified as being at risk for waste, fraud and abuse. *Id.* ¶ 47. The public's right to know outweighs these executives' right to privacy, because the firm the latter work for is largely beholden to federal subsidies that derive from people who are not even the company's customers and who have no choice whether to furnish the company their money. The Commission found that this consideration would have made it inequitable to treat a firm that is dependent on federal funds in the same vein as a firm that is not. The Commission issued orders granting in part and denying in part both utilities' motions. SMTC and LTC Adm. Rec. Item #4.

Both SMTC and LTC filed petitions for judicial review. As discussed, above, the district courts considering these petitions denied them and affirmed the PSC's determinations. Both utilities filed this joint appeal.

STANDARD OF REVIEW

This Court applies the same standard of review of an agency decision as the district court applies. *Northwestern Corp. v. Mont. Dept. of Pub. Serv. Regulation*, 2016 MT 239, ¶ 25, 385 Mont. 33, 380 P.3d 787 (citing *Whitehall Wind, LLC v. Mont. Pub. Serv. Comm'n.*, 2015 MT 119, ¶ 8, 379 Mont. 119, 347 P.3d 1273 (*Whitehall Wind II*) and *Molnar v. Fox*, 2013 MT

132, ¶ 17, 370 Mont. 238, 301 P.3d 824). A district court reviews an agency decision pursuant to the judicial review provisions of MAPA. Judicial review "must be confined to the record," and the Court "may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Mont. Code Ann. § 2-4-704. The agency should be reversed only "if substantial rights of the appellant have been prejudiced" because "findings, inferences, conclusions, or decisions" were unlawful, clearly erroneous, or arbitrary and capricious. *Id.* § 2-4-702.

This Court has interpreted these statutes to mean that a district court "reviews an administrative decision in a contested case to determine whether the agency's findings of fact are clearly erroneous and whether its interpretation of the law is correct." *Northwestern Corp.* ¶ 26 (citing *Whitehall Wind, LLC v. Mont. Pub. Serv. Comm'n.*, 2010 MT 2, ¶ 15, 355 Mont. 15, 223 P.3d 907 (*Whitehall Wind I*)); accord *Molnar*, ¶ 17 (conclusions of law are reviewed *de novo*)). "A finding of fact is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the court with a definite and firm conviction that a mistake has been made." *Id.* (citing *Williamson v. Mont. PSC*, 2012 MT 32, ¶ 25, 364 Mont. 128, 272 P.3d 71). "In reviewing findings of fact, the question is not

whether there is evidence to support different findings, but whether competent substantial evidence supports the findings actually made." *Id.* (citing *Mayer v. Bd. of Psychologists*, 2014 MT 85, ¶ 27, 374 Mont. 364, 321 P.3d 819).

An "agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence." *Id.* ¶ 27 (citing Mont. Code Ann. § 2-4-612(7)). "Substantial evidence is evidence that a reasonable mind could accept as adequate to support a conclusion; evidence beyond a scintilla." *Id.* (citing *Mayer*, ¶ 27). And while it is true that no deference is owed to an incorrect agency decision, a "court should give deference to an agency's evaluation of evidence insofar as the agency utilized its experience, technical competence, and specialized knowledge in making that evaluation." *Id.* (citing *Knowles v. State ex rel. Lindeen*, 2009 MT 415, ¶ 21, 353 Mont. 507, 222 P.3d 595).

Applying these standards to the three issues presented first involves a preliminary determination as to whether the PSC's decisions were based on conclusions of law, findings of fact, or a combination of both. With respect to the first issue, a privacy analysis under Article II, section 9, Mont. Const. is "not purely legal, but involve[s] the weighing of various facts to determine" whether appellants' right to privacy is clearly outweighed by the

merits of public disclosure. *Holyoak v. Mont. Eleventh Judicial Dist. Court*, 2010 Mont. LEXIS 607, OP 10-0498 (Nov. 30, 2010). Specifically, whether an individual has an expectation of privacy, "presents 'purely a question of fact.'" *Disablility Rights Mont. v. State*, 2009 MT 100, ¶ 22, 350 Mont. 101, 207 P.3d 1092 (citing *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 23, 333 Mont. 331, 142 P.3d 864). Similarly, the determination of "whether the merits of public disclosure exceeds the privacy interests at issue" is based on a court's "reasoned consideration of the underlying facts." *Id.* Thus, unless the underlying factual findings are clearly erroneous, this Court should affirm the Commission and district courts' determination that the telephone companies failed to establish that any privacy interests its top executives may have in their compensation clearly exceeds the merits of public disclosure of that information.

And while a determination as to whether the Commission's protocol for assessing the merits of a protective order versus public disclosure constitutes a "rule" may constitute a legal conclusion, the issue of whether the PSC and district courts erred in determining that the telephone companies failed to establish that compensation paid to their top executives was a "trade secret" involves a factual inquiry. *See* Mont. Code Ann. § 30-14-402(4) (defining trade secret). As such, it is subject to the same standard

of review as the first issue and should not be reversed absent a determination that the PSC's factual findings are clearly erroneous.

Any review of the decisions at issue in this case must give the appropriate deference to the Commission on the underlying issues of fact. *See* Mont. Code Ann. § 2-4-704(2) ("court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact"). More importantly, the telephone companies must first satisfy the statute's threshold burden to establish prejudice to their substantial rights before this Court may reverse or modify the Commission's decision based on the factors listed in Mont. Code Ann. § 2-4-704(2)(a).

SUMMARY OF ARGUMENT

A review of the record, properly guided by Mont. Code Ann. § 2-4-704, reveals that the telephone companies have not met their burden in seeking reversal of the Commission or district court decisions. The underlying facts supporting the Commission's decisions are not clearly erroneous and, more importantly, the telephone companies have not established the requisite prejudice to their substantial rights. As argued below, the Commission and district courts correctly determined that: 1) the telephone companies failed to establish that the privacy interests of their top executives in their compensation information clearly exceeds the merits of

public disclosure; 2) the Commission's rubric is not a "rule" within the meaning of MAPA and 3) the telephone companies failed to establish that compensation paid to their top executives qualified as a trade secret. Accordingly, the Commission and district court decisions should be affirmed.

ARGUMENT

I. The district courts correctly affirmed the Public Service Commission's determination that the telephone companies failed to establish that any privacy interests its top executives may have in their compensation clearly exceeds the merits of public disclosure of that information.

Article II, Section 9 of the Montana Constitution affords any person the right to inspect all documents of governmental agencies unless the demands of individual privacy clearly exceed the merits of public disclosure. In addressing this very issue before the 1972 Constitutional Convention, the Bill of Rights Committee noted:

> The committee intends by this provision that the deliberations and resolution of all public matters must be subject to public scrutiny. It is urged that this is especially the case in a democratic society wherein the resolution of increasingly complex questions leads to the establishment of a complex and bureaucratic system of administrative agencies. The test of a democratic society is to establish full citizen access in the face of this challenge.

Citing this note, this Court in *Great Falls Tribune v. Mont. Pub. Serv. Comm'n*, concluded that Article II, Section 9 "impose(s) an affirmative duty

on governmental officials to make all of their records and proceedings available to public scrutiny." *Great Falls Tribune,* ¶ 54. This Court further held:

> Consequently, there is a *constitutional presumption* that all documents in the hands of public officials are amenable to inspection, regardless of legislation, made to accommodate the exercise of constitutional police power, and other competing constitutional interests, such as due process.

Id. (emphasis added).

Accordingly, there is a constitutional presumption of openness unless the demands of individual privacy clearly outweigh the merits of disclosure. This Court has devised a now well-established two-pronged test in balancing the demands of individual privacy with the right-to-know: (1) whether the individual has a subjective or actual expectation of privacy and (2) whether society is willing to recognize that expectation as reasonable. *Bozeman Daily Chronicle v. City of Bozeman Police Dept.*, 260 Mont. 218, 225, 859 P.2d 435, 439 (1993). Only if a right of privacy exists and it is one which society would recognize as reasonable, then the custodian of the document must perform the balancing test to determine whether the privacy interest clearly exceeds the public's right to know.

While the Appellants insist that the rights afforded by Article II, § 9 and § 10 must be balanced against each other, this is not technically correct.

Appellant's Brief at 21. Article II, § 9, already provides the framework for weighing any privacy interest against the right to know and clearly provides that the right to know trumps any privacy concerns related to government documents or deliberations "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

The issue of whether an employee's compensation information was "private" within the meaning of Article II, Section 9 public disclosure requirements was first addressed by Attorney General Greely in 1980 in response to a query from the Director of the Montana Department of Administration as to whether a state employee's title, dates and duration of employment and salary were "public information." 38 A.G.Op. 105 (1980). Applying the analytical scheme cited, above, the Attorney General examined whether an individual state employee's dates of service and salary were "private" within the meaning of the right-to-know analysis.

The Attorney General reasoned that salaries of employees were not "intimate details" of a highly "personal nature" deserving of protection as matters of individual privacy. He cited *Penokie v. Michigan Technological University*, 93 Mich. App. 650, 287 N.W. 2d 304 (1980) where the Michigan Court of appeals ruled that the names and salaries of the persons employed by a state university were public. There, the Court held:

> The names and salaries of the employees of defendant university are not "intimate details" of a "highly personal" nature. Disclosure of this information would not thwart the apparent purpose of the exemption to protect against the highly offensive public scrutiny of wholly personal details. The precise expenditure of public funds is simply not a private fact.

Penokie, 287 N.W.2d at 309.

He also cited other jurisdictions addressing the same issue which were in accord. *See People ex.rel. Recktenwald v. Janura*, 376 N.E.2d 22 (Ill. App. 1978), *Hastings & Sons Publishing Co. v. City Treasurer*, 375 N.E.2d 299 (Mass. 1979), *Hans v. Lebanon School Board*, 290 A.2d 866 (N.H. 1972) and *Gannett Co. v. County of Monroe*, 303 N.E.2d 1151 (N.Y.2d 1978).

The *Penokie* court reflected that even if there were some privacy interest in compensation, it would still be disclosed because "(t)he minor invasion occasioned by disclosure of information which a university employee might hitherto have considered private is outweighed by the public's right to know precisely how its dollars are spent." *Penokie*, 287 N.W.2d at 310. This same balancing of privacy rights versus disclosure was addressed in *Redding v. Brady*, 606 P.2d 1193 (Utah 1980):

> Inasmuch as the very existence of public institutions depends upon finances provided by the public, it does not strike us as being discordant to reason that the public would like to know, and ought to know, how their money is spent.
> . . .

> In harmony with what has been said, herein, it is our conclusion that the rights of freedom of speech and of the press, and of the public to have and to publish the information as to the salaries paid to employees of the college, outweighs considerations as to the right of privacy of the employees, or of the institution to carry on its operations in secret.

Redding, 606 P.2d at 1196–97.

The rationale of the *Redding* decision was cited with approval in *Int'l Fed'n of Prof'l & Tech. Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 165 P.3d 488 (2007). There, a newspaper challenged a city's decision to not disclose the salaries associated with particular city employees earning $100,000 or more under the California Public Records Act. Citing *Redding*, the Appellate Court concluded that disclosure of the information did not violate the high earners right of privacy. It reasoned that salaries were not "personal data" and in light of public interest in governmental fiscal issues and the parties' interest in monitoring expenditure of public funds, disclosure was not an unwarranted invasion of personal privacy.

The Alaska Supreme Court is also in accord. In *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976 (Alaska 1997) the Court held that employee time sheets were not "personnel records" within the meaning of the Alaska statute protecting governmental employees' personnel records. This was so, explained the Court, because time records tell little about an employee's personal life. The Court also cited with approval similar rulings from other

states recognizing that payroll records, vacation and sick leave attendance records were disclosable under state public records laws because such records are not private facts of a personal nature. *See Perkins v. Freedom of Info. Comm'n,* 228 Conn. 158, 635 A.2d 783 (1993) (disclosure of numerical data concerning public employee's attendance records not an invasion of privacy); *Brogan v. School Comm. of Westport,* 401 Mass. 306, 516 N.E.2d 159, 160–61 (1987) (disclosure of absentee records of individual teachers held valid where records did not contain specific medical information); *Sipe v. Snyder,* 163 Pa.Cmwlth. 232, 640 A.2d 1374, 1381 (1994) and *Kanzelmeyer v. Eger*, 329 A.2d 307 (1974) (privacy considerations must yield to public's interest in public servant's performance); *Dombronski v. FCC,* 17 F.3d 275 (9th Cir. 1994) (affirming judgment compelling disclosure of sick leave records which did not contain personal medical of health information); *State ex.rel. Petty v Wurst,* 550 N.E.2d 214 (Ohio Ct of App. 1989) (public's right to inspect payroll records outweighs any nominal invasion of county employee's privacy).

Attorney General Racicot cited the line of cases discussed above in answer to a request from the Montana Highway Department as to whether payroll record information, including the names, addresses and wages of private employees working for a private contractor on a federally funded

state highway project was subject to disclosure under Article II, Section 9 of the Montana Constitution. 43 A.G. Op. 6 (1989). Recognizing that resolution of an issue involving public employees is not necessarily dispositive of an issue concerning private employees working on a publically funded project, Attorney General Racicot still found the reasoning of the prior opinion persuasive in that wages are not intimate details of a highly personal nature. This is particularly so in light of the public's "substantial interest in verifying that employees receiving federal funds are complying with labor laws." "In my opinion, the slight demand for individual privacy concerning names, addresses and wages does not outweigh the merits of public disclosure." *Id.* at p. 3.

Later in 1989, Attorney General Racicot issued an opinion finding that the public had a substantial interest in verifying a Montana home loan participant's continued compliance with Montana's State Mortgage Credit Certificate program. 43 A.G. Op. 25 (1989). The opinion ultimately recommended that the participant's personal income information not be protected in order to allow the public to verify compliance with the mortgage program. *Id.*

The Commission cited the State Mortgage Credit opinion in its underlying decisions. Or. 7385 ¶ 32 and Or. 7385a ¶ 32. This AG opinion

and the other above cited opinions contain the identical rationale relied upon by the Commission and district courts. Indeed, Mont. Code Ann. § 2-15-501(7) provides that "[i]f an opinion issued by the attorney general conflicts with an opinion issued by a city attorney, county attorney, or an attorney employed or retained by any state officer, board, commission, or department, the attorney general's opinion is controlling unless overruled by a state district court or the supreme court." While these Opinions are certainly not binding, this Court will often cite to, and take guidance from, such opinions. *See e.g., City of Helena v. Svee*, 2014 MT 311, ¶¶ 15–16, 377 Mont. 158, 339 P.3d 32.

Applying the above rationale, and the well-settled privacy standard, the Commission recognized some privacy interest in high level employees' compensation, but concluded that either society would not recognize that interest as significant or more importantly, whatever privacy interest existed, it did not clearly exceed the interests of the public in knowing how public money was expended. The district courts agreed, as should this Court. How public monies are spent and where public funds go are quintessential questions members of the public want, and deserve, to know. Based on the proportion of federal funds to their entire revenue stream, a significant portion of the executives' salaries derive from federal funds (55 percent in

the case of SMTC and 30 percent in the case of LTC). As such, disclosure of such information serves the public interest and certainly is not outweighed by any minimal privacy interests the executives may have in their publicly subsidized compensation. Indeed, this Court has previously erred on the side of disclosure when public funds are at issue. *See Citizens to Recall Whitlock v. Whitlock*, 255 Mont. 517, 524, 844 P.2d 74, 78 (1992) ("[s]ince public funds were used to settle the dispute and may be used to indemnify Whitlock for his attorney fees, the public is entitled to know the precise reason for such an expenditure). LTC and SMTC failed to convince the Commission and the district court that any privacy interests its top executives may have in their compensation clearly exceeds the merits of public disclosure of that information. Therefore the Commission correctly determined that executive compensation information of LTC and SMTC must be subject to public disclosure.

II. The district courts correctly concluded that the Public Service Commission's method of assessing public disclosure of the compensation paid to the telephone companies' top executives was not a "rule" within the meaning of the Montana Administrative Code's rule making protocol.

The telephone companies contend that the method by which the Commission evaluates whether to require disclosure of information should have been adopted pursuant to MAPA and its failure to do so renders its

method invalid. Both district courts recognized the distinction between a standard of applicability and the exercise of judgment about whether certain information should be protected from disclosure. While a standard of general applicability—a balancing test—is something that might be established by formal rule, the application of the balancing test necessarily done on a case-by-case basis is not.

Further, it is well-established principle of administrative law that:

> [P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.

SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947) (internal citations omitted) (cited with approval in *Ramage v. Dep't of Revenue*, 236 Mont. 69, 73, 768 P.2d 864, 866 (1989)). Here, the Commission applied a constitutional standard to the case-by-case consideration of public disclosure. This right to take the approach as proposed in *Chenery Corp.* is even stronger when the Montana Supreme Court has specifically

admonished the Commission to address protective orders on a case-by-case basis.

Indeed, Judge Seeley acknowledged that the Commission would be violating its obligations under the *Great Falls Tribune* mandate if it tried to impose a MAPA adopted rule of general applicability. Seeley Order, p.7, ll. 10–14. Judge Menahan, in accord, determined "(t)he PSC is not required to initiate rule-making to determine which factors to apply when balancing the individual's right of privacy versus the public's right to know." He observed that an agency's factual determination when conducting a legal analysis under the Montana open-records laws are not "rules" under MAPA. If this were not true, every state, county, and local government would have to initiate rule-making efforts every time they received a request for disclosure of information. Menahan Order, p. 10, ll. 20–25.

Both district courts acclaimed the PSC's "rubric" as a method of exercising discretion on motions for protective order that not only satisfied the case-by-case mandate of *Great Falls Tribune* but also avoided conflicting outcomes in its decisions to grant or deny motions for protective orders.

Finally, both district courts concluded that the three factors considered by the Commission in denying the motions for protective order from both

utilities were legitimate and consistent with Montana right-to-know law. Judge Seeley noted, "[t]he PSC's reasoning protects the salaries (from disclosure) of those not in management or executive positions while paying heed to the need for transparency in the expenditure of federal monies." Seeley Order, p. 15, ll. 23–25.

There can be no cognizable claim for a violation of MAPA for an agency or commission which simply adopts and follows a rubric in order to guide and facilitate its privacy balancing analysis. This Court should therefore affirm the Commission and district court decisions with respect to the propriety of the rubric.

III. The district courts correctly affirmed the Public Service Commission's determination that the telephone companies failed to establish that compensation paid to their top executives was a "trade secret."

In *Great Falls Tribune*, this Court made it clear that before a utility could obtain a protective order from the PSC, it "must support its claim of confidentiality by making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements." *Great Falls Tribune*, ¶ 56. Although concurring Justice Nelson expressed reservations about whether a "trade secret" could justify a claim of confidentiality, the Court recognized that a property right in the form of a trade secret which warrants due process protection, can be

preserved by the agency through a protective order. *Id.* ¶62.

Mont. Code Ann. § 30-14-402 defines a "trade secret" as:

> [I]nformation or computer software, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means, by other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The PSC follows a detailed six-part test to evaluate a motion for protective order to protect a trade secret. A party requesting a protective order based on trade secret must demonstrate that:

> (ii) the claimed trade secret material is information; (iii) the information is in fact secret; (iv) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy; (v) the secret information is not readily ascertainable by proper means; and (vi) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy.

Mont. Admin. R. 38.2.5007(4)(b).

The Commission's Order denying the protective orders found that both utilities failed to make a *prima facie* showing that the executive compensation information derived independent economic value from its secrecy, or that competitive advantage is derived from its secrecy.

A fundamental principle of administrative law is that an agency's experience, technical competence, and specialized knowledge may be

utilized in the evaluation of evidence. Mont. Code Ann. § 2-4-612. This Court has consistently afforded great deference to agency decisions, especially where the decision implicates substantial agency expertise. *Clark Fork Coalition v. Dep't of Envlt. Quality,* 2012 MT 240, ¶ 48, 366 Mont. 427, 288 P.3d 183.

In addition to determining that the utilities failed to establish a *prima facie* case, the PSC applied its own expertise with ETC regulation in determining whether executive compensation information is a trade secret. The Commission has regulated telecommunications carriers for most of its existence. The compliance filings of ETCs are reviewed by the Commission prior to it certifying ETCs to the FCC every year. The Commission is the agency most familiar with how telecommunications carriers operate in Montana, whether or not they actually have competitors, and how decisions may impact any competitors. The Commission applied its experience in regulating these utilities and determined the information did not "derive independent economic value from its secrecy, or a competitive advantage." Or. 7385 ¶¶ 23–24, Or. 7385a ¶¶ 22–24, Or. 7385c ¶¶ 19–23 and Or. 7385d ¶¶ 19–23.

The Commission found that disclosure of employee compensation would not jeopardize retention of employees or result in providing

competitors with any advantage to the detriment of a telecommunications company. Many utility companies regulated by the Commission are actually required to disclose certain executive compensation information to the Securities and Exchange Commission and Federal Energy Regulatory Commission. Disclosure of a past year's utility manager's compensation information in the spring of the following year through an annual report does not confer any particular competitive advantage, given the realities of how employees are hired and the lack of competitors. Receipt of substantial federal funding by both carriers necessarily reflects a lack of competition among telecommunications carriers in their respective service areas. Disclosure of management compensation confers no competitive advantage when there are no other competitors in the utilities' service areas.

The Commission correctly applied the administrative rule governing whether a trade secret exists and determined that executive compensation information of a utility does not derive independent economic value or competitive advantage from its secrecy. Therefore, this information does not constitute a trade secret and this Court should defer to the PSC's expertise on matters of economic value and competitive advantage of telecommunications information as the two District Courts did in their respective orders.

IV. New issues presented for the first time on appeal from the Montana Telecommunications Association's *Amicus* Brief should be disregarded by this Court.

The Montana Telecommunications Association ("MTA"), in its *Amicus* brief, raises a new issue regarding separation of powers which was not raised by either SMTC or LTC in the underlying district court cases. MTA *Amicus* Brief p. 11-12. In addition, SMTC and LTC did not raise MTA's contention that broadband deployment will in fact be harmed by public disclosure in the administrative proceeding. "As a general rule, a party may raise on direct appeal only those issues and claims that were properly preserved." *State v. West*, 2008 MT 338, ¶16, 346 Mont. 244, 194 P.3d 683. "To properly preserve an issue or claim for appeal, it is necessary that the issue or claim be timely raised in the first instance in the trial court. *Id.* "[I]t is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *Day v. Payne,* 280 Mont. 273, 276–277, 929 P.2d 864, 866 (Mont. 1996). Therefore this Court should disregard MTA's arguments involving separation of powers and harm to broadband deployment by public disclosure as these issues are not properly before the Court as they were not raised in either district court case.

CONCLUSION

As established by the above arguments and authority, and consistent with the statutory dictates of agency judicial review, this Court should affirm the Commission and district court's decisions regarding the public nature of the telephone companies' executive salary information. The public's right to know exceeds any minimal privacy expectation and the Commission's rubric is a proper method to conduct this balancing test. Lastly, the executives' salary information does not constitute a trade secret.

Dated this 30th day of January, 2017.

By: _____
Peter Michael Meloy
Attorney for Appellee

CERTIFICATE OF COMPLIANCE

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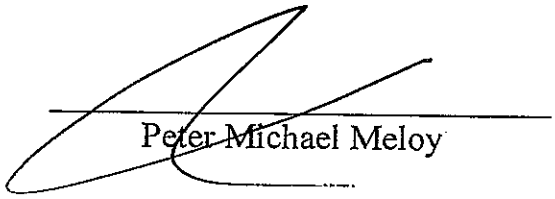
DATED this 30th day of January, 2017.



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This is to certify that on the 30th day of January, 2017, a true and exact copy of the foregoing document was delivered via U.S. Mail, postage pre-paid on the following:

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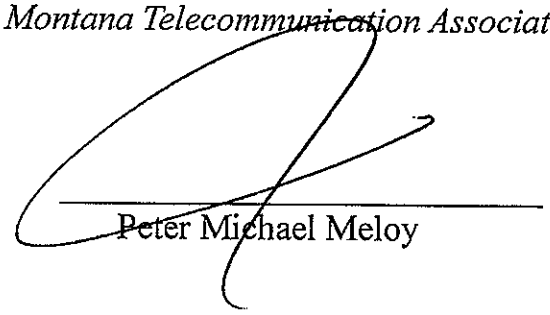

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